IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 687

MURPHY AUTO PARTS CO., INC., *Petitioner*,

v.

THOMAS CHARLES BALL, through his next friend, RITA H. BALL,

and

GEORGE J. BALL, SR., and RITA H. BALL, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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JURISDICTIONAL STATEMENT

Judgment of the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the United States District Court for the District of Columbia (Petitioner's Appendix 12 through 18). The decision was a unanimous opinion by the

United States Court of Appeals for the District of Columbia Circuit (Petitioner's Appendix 12 through 18). The petitioner moved for a rehearing in banc and on November 22, 1957 a unanimous order was entered denying the petition for rehearing in banc.

QUESTIONS PRESENTED

1. Whether the petitioner has presented a Federal question justifying review by this Court when the opinion clearly shows that the United States Court of Appeals for the District of Columbia Circuit in its opinion enunciated a rule of evidence with respect to the admission of a res gestae declaration thus clearly showing that there is no Federal question or conflict in the Circuits justifying review by this Court.

CONSTITUTIONAL PROVISIONS

There are no constitutional provisions involved and this case merely concerns the correctness of the trial court's discretion in admitting an excited utterance shortly after an accident involving an employee of the petitioner.

COUNTERSTATEMENT OF THE CASE

Contrary to the statement of the case by the petitioner the evidence showed that the employee Murphy was a salesman and that he called upon customers between 8 o'clock in the morning and 5 P.M. This was shown by petitioner's answer which was filed to the complaint and offered in evidence as an admission against interest. There was also introduced in evidence the fact that the petitioner paid the employee Murphy $10 a week for the use of his automobile. At the trial the petitioner denied that the $10 per

week was given to his employee Murphy for the use of his automobile. However, his business records were subpoenaed and close examination showed that business deductions were taken by the petitioner for this payment of $10 per week (R. 56 A to 37 A). The spontaneous utterance which was admitted in this case was clearly a part of the res gestae and there had been prior testimony establishing the employer-employee relationship (R. 81 A). Judgment was entered in favor of the respondent. The Court of Appeals for the District of Columbia unanimously affirmed in its written opinion (Petitioner's App. 12-18) and a unanimouse order was entered by all nine judges denying the rehearing in banc.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There is no Federal issue presented in this appeal. There is an absence of a constitutional issue. There is no conflict between the Circuits. The ruling in this case on the admission of a res gestae declaration is an exclusive right to be determined by the Court of Appeals for the District of Columbia insofar as it affects the District of Columbia. See *Griffin* v. *United States*, 336 U.S. 704. This petition is in effect an attempt to ask this Court to review a discretionary ruling of the trial judge admitting in evidence an excited utterance.

This Court has before it the lengthy opinion of the United States Court of Appeals for the District of Columbia Circuit in which all the authorities are discussed pro and con on the admission of a spontaneous declaration. It is thus apparent that the only issue involved in this appeal was the correctness or incorrectness of the trial judge's ruling in admitting the declaration of the employee James B. Murphy immediately

after the accident in this case. The petitioner attempts to state that the ruling in this case is contrary to *Dudley* v. *Preston Motor Co.* (1931), 51 F. 2d 8. This contention is unsound for two reasons:

1. An inspection of the Preston Motor Co. case which is cited in the opinion of the Court of Appeals for the District of Columbia shows that it is plainly distinguishable. In the Preston case there had been no independent evidence to establish the employee-relationship when the declaration was received. In this case there was such independent evidence in the form of the answer filed by the petitioner in which he admitted that the employee James B. Murphy called upon customers. There was also received in evidence in this case the books of account which showed that the employee James B. Murphy received $10 per week for the use of his automobile in calling upon customers. As cited at Page 16 of Petitioner's Appendix, the ruling of the trial judge and the Court of Appeals for the District of Columbia is sustained by the following authorities:

> "Mecham, Agency Section 1793 (1914). For a case applying, if not recognizing this principle, see Chantry v. Pettit Motor Co., 156 S.C. 1, 152 S.E. 753 (1930), and full discussion in the dissent. Cf. Mancuso v. Hurwitz-Mintz Furn. Co., 183 So. 451 (La. App. 1939); Lowie v. Dixie Stores Co., 172 S.C. 468, 174 S.E. 394 (1934)."

Therefore, an inspection of the record shows that there is no conflict between the ruling of the present case and the ruling of the Sixth Circuit. However, there is an even more controlling reason why, assuming arguendo there was a conflict between the Court of Appeals for the District of Columbia and the Sixth

Circuit, it would not justify review by this Court because the Court of Appeals for the District of Columbia acts in a special way distinguishable from all other Circuit Courts when it rules on the admission or reception or rejection of evidence for courts in the District of Columbia. That the United States Court of Appeals for the District of Columbia Circuit has a special function insofar as the District of Columbia is concerned in announcing rules of evidence is ably discussed by Mr. Justice Frankfurter in *Griffin* v. *United States*, 336 U.S. 704 where Mr. Justice Frankfurter stated:

> "If Congress can enact substantive rules of criminal law exclusively for the District of Columbia, *the Court of Appeals for the District of Columbia ought not to be denied opportunity to formulate rules of evidence appropriate for the District, so long as the rules chosen do not offend statutory or constitutional limitations.* * * * But even assuming that the 'federal rule' is that the evidence described in the motion for a new trial would be admissible, *it does not follow that it must also be the rule for the District of Columbia. This Court, in its decisions, and Congress, in its enactment of statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law.*"

Thus it is apparent from the above that the Court of Appeals for the District of Columbia has merely affirmed the discretionary ruling of the trial judge on the admissibility of a spontaneous utterance.

2. Jurisdictional review by certiorari should be sparingly exercised and should be limited to cases of peculiar gravity and general importance. *Ex Parte*

Lau Ow Bew, 12 S. Ct. 45, 141 U.S. 583; *Hamilton Brown Shoe Co.* v. *Wolf*, 36 S. Ct. 269, 240 U.S. 251.

None of the decisions of this Court cited at Page 5 of the petitioner's petition for certiorari are in point. In summarizing them succinctly, *First Unitarian Soc.* v. *Falkner*, 91 U.S. 415, involved a vicarious relationship and did not concern the admissibility or inadmissibility of a res gestae declaration. In *Vicksburg & Meridian R. Co.* v. *O'Brien*, 119 U.S. 99, and *Union Packet Co.* v. *Clough*, 22 L. Ed. 405, the decisions specifically pointed out that the declarations were not admissible since they were not part of the res gestae, the declaration of the Vicksburg case occurring two days after the exciting event.

The present case is divested of any constitutional issue or Federal question and contains none of the requirements set up by Rule 38(5)(a)(b)(c) of this Court for the granting of certiorari. The present opinion is merely the affirmance of a discretionary ruling of the trial judge in admitting an excited utterance where there had been independent evidence establishing the employee relationship between the employee James B. Murphy and the petitioner.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be denied.

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